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DECISION
ON PETITION

OBLON, SPIVAK, MCCLELLAND, MAIER & NEUSTADT, P.C.
1940 DUKE STREET
ALEXANDRIA VA 22314

In re Application of:
Erich Bayer
Application Serial No.: 10/030,192
Filed: February 4, 2002
For: **OTOPLASTY FOR BEHIND-THE-EAR
HEARING AIDS**

This is a decision on the petition filed October 8, 2004 which is treated as a Petition to Withdraw the Holding of Abandonment pursuant to 37 CFR 1.181. No fee is required.

The petition is **GRANTED**.

This application was held abandoned for failure to timely file a proper response to the final Office action mailed September 8, 2003. A Notice of Abandonment was mailed on September 22, 2004.

A review of the record indicates that the final Office action was mailed September 22, 2003. An amendment and Notice of Appeal was subsequently filed on March 8, 2004. Furthermore, the Notice of Appeal included appropriate petition for three month extension of time and Notice of Appeal. An advisory action was mailed on April 2, 2004.

MPEP §1205 Notice of Appeal, states in part:...

The notice of appeal and appropriate fee may be filed up to 6 months from the date of the final rejection, so long as an appropriate petition and fee for an extension of time is filed either prior to or with the notice of appeal. [emphasis added]

MPEP §1206 Appeal Brief, states in part:...

TIME FOR FILING APPEAL BRIEF

37 CFR 1.192(a) provides 2 months from the date of the notice of appeal for the appellant to file an appeal brief. In an ex parte reexamination proceeding, the time period can be extended only under the provisions of 37 CFR 1.550(c). See also MPEP § 2274.

The usual period of time in which appellant must file his or her brief is 2 months from the date of appeal. The Office date of receipt of the notice of appeal (and not the date indicated on any Certificate of Mailing under 37 CFR 1.8) is the date from which this 2 month time period is measured. See MPEP § 512. However, 37 CFR 1.192(a) alternatively permits the brief to be filed "within the time allowed for reply to the action from which the appeal was taken, if such time is later." These time periods may be extended under 37 CFR 1.136(a), and if 37 CFR 1.136(a) is not available, under 37 CFR 1.136(b) for extraordinary circumstances. [emphasis added]

37 C.F.R. § 1.136 Extensions of time, states in part:

(a)

(1) If an applicant is required to reply within a nonstatutory or shortened statutory time period, applicant may extend the time period for reply up to the earlier of the expiration of any maximum period set by statute or five months after

the time period set for reply, if a petition for an extension of time and the fee set in § 1.17(a) are filed, unless:

- (i) Applicant is notified otherwise in an Office action;
- (ii) The reply is a reply brief submitted pursuant to § 1.193(b);
- (iii) The reply is a request for an oral hearing submitted pursuant to § 1.194(b);
- (iv) The reply is to a decision by the Board of Patent Appeals and Interferences pursuant to § 1.196, § 1.197 or § 1.304; or
- (v) The application is involved in an interference declared pursuant to § 1.611.

Given that the two months from the date of a Notice of Appeal for filing an Appeal Brief, is nonstatutory, applicant could have extended the time period for filing their Appeal Brief up to five months (if appropriate petition for extensions of time were granted) following the expiration of the original two months set forth in 37 C.F.R. §1.192(a). Accordingly, applicant's Appeal Brief would not have been due until October 8, 2004. A review of the file contents reveals that applicant in fact did petition for five months extension of time on October 8, 2004.

Accordingly, the Notice of Abandonment mailed on September 22, 2004 was premature and is hereby vacated.

Further review of the application reveals that applicant did not file an Appeal Brief along with the petition for extension of time on October 8, 2004. Instead, the request (treated as a petition) for five months extension of time indicates that a continuation application was filed in lieu of an Appeal Brief. Therefore, the application file will be forwarded to the examiner for issuance of a new Notice of Abandonment.

From there, the application file will be forwarded to the Technology Center's technical support staff for re-crediting applicant's deposit account for the petition fee of \$130.00. This petition was treated as a petition under 37 C.F.R. §1.181 whereby a petition fee is not required.



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